

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

RAYMOND E. HUTCHINSON

Claimant

V.

CITY OF ARKANSAS CITY

Respondent

AND

KANSAS MUNICIPAL INSURANCE TRUST

Insurance Carrier

Docket No. 1,068,047

ORDER

STATEMENT OF THE CASE

Claimant requested review of the April 29, 2016, Award entered by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on August 19, 2016. Orvel Mason of Arkansas City, Kansas, appeared for claimant. William L. Townsley, III, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ found claimant sustained a 27 percent permanent partial impairment to the right upper extremity at the level of the shoulder. The ALJ gave no weight to the rating opinion of Dr. Justin Strickland, and instead adopted and averaged the opinions of Drs. Melhorn and Flutter.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant argues the most credible medical opinion proves he sustained a 37 percent impairment of function at the level of the shoulder. Claimant contends he is entitled to future medical care.

Respondent maintains claimant is entitled to a scheduled injury award consistent with the medical opinions of Drs. Strickland and Melhorn. Respondent argues claimant is not entitled to an award for right elbow or wrist impairment.

The sole issue for the Board's review is: what is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant is employed with respondent as a maintenance electrician. On February 6, 2013, claimant was approximately 40-45 feet in the air in a bucket truck helping cut down a dead tree when a long cable attached to a block and tackle began to fall. The block and tackle system, used to lower cut limbs to the ground, weighed approximately 40-45 pounds. Claimant caught the cable with his right hand to prevent it from landing on the crew below. The weight pulled him from the bucket, but he was saved by his safety harness. Claimant testified he heard a loud pop in his right shoulder before his shoulder went numb. Claimant described his pain as a dull ache in his right shoulder and biceps, accompanied by numbness. Claimant continued to work on a self-limiting basis until he reported the incident to his supervisor two days later. Respondent sent claimant to Dr. Schmeidler for medical treatment.

Claimant was diagnosed with a strained shoulder and possible rotator cuff injury. He was sent for an MRI before being examined by board certified orthopedic surgeon Dr. Justin Strickland on March 20, 2013. Dr. Strickland reviewed the MRI and determined claimant had two separate rotator cuff tears and a torn right biceps tendon, requiring surgery. Dr. Strickland performed a shoulder arthroscopy, a biceps tenotomy, a subacromial decompression, and repaired both the subscapularis and supraspinatus on April 18, 2013. Claimant continued to follow up with Dr. Strickland until his release on September 27, 2013. Dr. Strickland did not assign permanent work restrictions, but recommended claimant self-limit his activities.

Claimant stated he initially noticed numbness and tingling in his right hand approximately two weeks following surgery. Claimant explained he has only numbness and tingling in his right thumb, index and middle fingers, with no pain.

Dr. Strickland testified claimant complained of radiating pain from his right shoulder down into his arm throughout treatment. Dr. Strickland noted most patients with a shoulder issue complain of pain down the arm and into the hand, but usually this pain will resolve after the shoulder is treated. Dr. Strickland did not address claimant's wrist or elbow complaints.

Using the *AMA Guides*,¹ Dr. Strickland opined claimant sustained a 6 percent permanent partial impairment to the right upper extremity based on a lack of internal rotation of the shoulder and a mild lack of strength. Dr. Strickland testified he has no

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

formal training in providing ratings pursuant to the *Guides*. However, he stated he has more than seven years' experience providing impairment ratings.² Dr. Strickland testified he could not recall if he used a goniometer to measure claimant's range of motion. He measured only claimant's forward elevation, internal rotation, and external rotation, stating the other measurements were functionally irrelevant to him. Dr. Strickland did not address claimant's right hand or elbow complaints, nor did he comment on claimant's need for future medical treatment.

In 1990, claimant obtained treatment for right shoulder subacromial bursitis and supraspinatus tendinitis. Claimant explained he continuously worked overhead at that time, and his issues resolved once he adjusted his work habits. Claimant testified he sustained a fractured right scapula as a result of a motor vehicle accident in 2004.³ Claimant underwent conservative treatment and testified his right shoulder had not returned to full strength as a result of the fracture, having regained maybe 95 percent of the strength in his right arm. In 2012, claimant was assigned by his foreman to work on a tin roof and slipped while doing so, falling onto his right shoulder and elbow. Claimant did not fall from the roof. Claimant was seen by the company physician assistant the day after the incident and followed up one week later. Claimant testified that was the extent of his treatment in 2012, and he had no problems with his right shoulder or right arm as a result. He was never provided permanent work restrictions for any incident prior to 2013.

Board certified physician Dr. George Fluter first examined claimant, at his counsel's request, on February 12, 2014, for treatment recommendation purposes. Dr. Fluter reviewed claimant's medical records, history, and performed a physical examination. Dr. Fluter diagnosed right shoulder/upper extremity pain and right shoulder internal derangement resulting from claimant's work-related injury. Dr. Fluter imposed temporary restrictions and recommended additional conservative treatment and diagnostic testing.

Dr. Fluter was designated as claimant's authorized treating physician by ALJ Clark in April 2014. Dr. Fluter referred claimant for EMG and NCT testing due to claimant's complaints of numbness and tingling in his right arm and hand. The tests revealed findings consistent with mild right median mononeuropathy at or distal to the wrist, or carpal tunnel syndrome (CTS). Claimant did not pursue surgery, but opted for conservative treatment in the form of a wrist brace.

Claimant continued to treat with Dr. Fluter until his release on March 24, 2015. Dr. Fluter testified the work-related incident of February 6, 2013, was the prevailing factor causing claimant's right shoulder and arm injuries, resulting in rotator cuff tears and CTS.

² See Strickland Depo. at 10.

³ Dr. Fluter reviewed notes related to claimant's 2004 accident, noting he sustained a right acromion fracture which improved with conservative treatment. (See Fluter Depo. at 51-52.)

Dr. Fluter also opined these injuries are the prevailing factor for claimant's need for treatment and resulting impairment.

Dr. Fluter measured claimant's range of motion using a goniometer. Using the *AMA Guides*, Dr. Fluter testified:

Well, based upon range of motion measurements there were impairments to the shoulder, elbow and wrist due to the reduced range of motion at those joints. There was a 15 percent impairment, upper extremity impairment at the level of the shoulder, for range of motion deficits. There was a six percent impairment at the level of the elbow for range of motion deficits. And there was also a 12 percent impairment at the level of the wrist for range of motion deficits.

I also . . . felt because of the electrodiagnostic studies demonstrating carpal tunnel syndrome, or median nerve entrapment at the wrist, that was of a mild degree, that there would be a ten percent upper extremity impairment for that. So those were the bases of the impairment rating that I calculated.⁴

Dr. Fluter's ratings combine to a 37 percent permanent partial impairment to the right upper extremity at the level of the shoulder. Dr. Fluter testified claimant's injury encompassed his entire upper extremity because the arm is "all one kinetic chain."⁵ Dr. Fluter indicated claimant would require future medical care including medications, possible additional physical therapy, possible injections, and possible CTS surgery. Dr. Fluter recommended restricting claimant to a physical demand level between light and medium.

Board certified orthopedic surgeon Dr. J. Mark Melhorn examined claimant on September 22, 2015, at respondent's request. Claimant complained of residual symptoms involving his right hand and wrist. Dr. Melhorn reviewed claimant's history, medical records, and performed a physical examination. He determined claimant sustained a right shoulder rotator cuff tear and right CTS. Dr. Melhorn testified the work-related incident of February 2013 was the prevailing factor for claimant's right CTS.

Dr. Melhorn noted claimant was given the option of surgery for his CTS, but declined, putting him at maximum medical improvement. Dr. Melhorn testified he measured claimant's range of motion with a goniometer. Dr. Melhorn stated he did not record the numbers for claimant's right elbow in his report because claimant's elbow range of motion was normal. Both claimant and his wife, Julie Hutchinson, testified Dr. Melhorn did not use a goniometer at the appointment, nor did he put claimant through the necessary motions. Mrs. Hutchinson stated she attended the appointment with her husband and was familiar with the goniometer from personal experience.

⁴ Fluter Depo. at 22-23.

⁵ *Id.* at 27.

Dr. Melhorn provided a rating opinion on October 13, 2015, using the *AMA Guides*. Dr. Melhorn opined claimant sustained a 13 percent impairment to the right upper extremity at the level of the shoulder. Based on claimant's subjective complaints of numbness in the median nerve distribution, Dr. Melhorn provided a 3.9 percent impairment to the right forearm. Dr. Melhorn noted these ratings combine for a total 16.9 percent permanent partial impairment. He did not consider claimant to have any preexisting impairment. Dr. Melhorn did not address whether claimant was in need of future medical treatment.

Claimant continues to work for respondent on a self-limiting basis. Claimant testified he has a constant burning sensation in his right shoulder with radiating pain to his biceps and forearm. Claimant stated his right hand goes numb, causing him to drop things. Claimant testified his medication and the use of a TENS unit help with his pain.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501b(c) states:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508(h) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2012 Supp. 44-508(g) states:

"Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

K.S.A. 2012 Supp. 44-510d provides, in part:

(a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i, and amendments thereto. The injured employee may be entitled to payment of temporary total disability as defined in K.S.A. 44-510c, and amendments thereto, or temporary partial disability as defined in subsection (a)(1) of K.S.A. 44-510e, and amendments thereto, provided that the injured employee shall not be entitled to any other or further compensation for or during the first week

following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total or temporary partial disability as provided in the following schedule, 66 $\frac{2}{3}$ % of the average weekly wages to be computed as provided in K.S.A. 44-511, and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c, and amendments thereto.

(b) If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

(13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.

. . .

(24) Where an injury results in the loss of or loss of use of more than one scheduled member within a single extremity, the functional impairment attributable to each scheduled member shall be combined pursuant to the fourth edition of the American medical association guides for evaluation of permanent impairment until January 1, 2015, but for injuries occurring on and after January 1, 2015, shall be combined pursuant to the sixth edition of the American medical association guides to the evaluation of permanent impairment, and compensation awarded shall be calculated to the highest scheduled member actually impaired.

ANALYSIS

The Board agrees with the ALJ's conclusion that claimant suffers a 27 percent impairment to the right upper extremity at the level of the shoulder.

The ALJ rightfully did not place significant weight on the opinions of Dr. Strickland in arriving at his conclusion. Dr. Strickland could not remember if he used a goniometer to arrive at his range of motion findings. In *Young v. Midway Wholesale*, the Board found a physician should have used a goniometer to measure range of motion, stating, "'Eyeballing' range of motion is not enough."⁶ In *Kindlesparger v. Fabsource, Inc.*, the Board disregarded the opinion of a physician who did not use a goniometer, and adopted the opinion of a physician who arrived at his impairment rating "using a goniometer and a

⁶ *Young v. Midway Wholesale*, No. 1,067,022, 2015 WL 9672649 (Kan. WCAB Dec. 28, 2015).

hand dynamometer and following the *AMA Guides*.⁷ Both of the two other physicians who provided impairment ratings in this case testified they used a goniometer.

Dr. Strickland also measured only claimant's forward elevation, internal rotation, and external rotation. In addition to the measurements taken by Dr. Strickland, both Drs. Fluter and Melhorn included measurements for flexion, extension, abduction and adduction. It is apparent Drs. Fluter and Melhorn performed a more thorough examination to arrive at their opinions regarding the extent of claimant's impairment. The weight of the evidence favors the methods used by Drs. Melhorn and Fluter.

The Board finds the opinions of Drs. Fluter and Melhorn to be equally credible. Both found claimant suffered a permanent impairment of function to his right forearm and shoulder as the result of his work-related injury by accident. The only major discrepancy between the two is that Dr. Melhorn found no impairment to claimant's right elbow.

Respondent disputes the relationship of claimant's CTS and the work-related injury. Respondent's own expert, Dr. Melhorn, opined the work-related incident of February 2013 was the prevailing factor for claimant's right CTS. The Board will not disregard Dr. Melhorn's causation opinion.

Dr. Melhorn testified he did not find range of motion loss in claimant's right elbow on the day the examination was performed. There is no indication in the record that Dr. Melhorn's testimony in this regard is not credible. Dr. Melhorn cannot be expected to provide an impairment rating for a physical condition that cannot be verified by examination.

CONCLUSION

The opinions of Drs. Melhorn and Fluter are given equal weight. Claimant sustained the burden of proving he suffers a 27 percent permanent partial impairment to the right shoulder, elbow and forearm as the result of his February 6, 2013, work-related injury by accident.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated April 29, 2016, is affirmed.

IT IS SO ORDERED.

⁷ *Kindlesparger v. Fabsource, Inc.*, No. 1,051,019, 2011 WL 4011678 (Kan. WCAB Aug. 23, 2011).

Dated this _____ day of September, 2016.

BOARD MEMBER

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Hon. Thomas Klein, Administrative Law Judge